87-892

Supreme Court, U.S.
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NOV 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

Supreme Court Of The United States

October Term, 1987

JACKIE DALLIE ARRANT,

Petitioner,

V.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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November 19, 1987

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October Term, 1987

JACKIE DALLIE ARRANT,

Petitioner,

V.

STATE OF ALABAMA,

Respondent.

CERTIFICATION OF SERVICE

I hereby certify that three copies of the attached Petition for Writ of Certiorari was forwarded to Hon. Don Siegelman, Attorney General for the State of Alabama, Attorney for the Respondent, at 11 South Union Street, Montgomery, Alabama, by depositing same in the United States Mail, properly addressed and postage prepaid, this the 19th day of November, 1987.

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I.

QUESTIONS PRESENTED

I. DOES THE APPELLATE COURT'S DECISION INCORRECTLY CONSTRUE THE RIGHT OF SELF INCRIMINATION AS IS AFFORDED THE PETITIONER UNDER THE FIFTH AMENDMENT OF THE *CONSTITUTION OF THE UNITED STATES OF AMERICA* AND UNDER ARTICLE I, SECTION 6 OF THE *CONSTITUTION OF ALABAMA, 1901*?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

No._____

JACKIE DALLIE ARRANT,
Petitioner,

V.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner, Jackie Dallie Arrant, would respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this matter on August 28, 1987. That judgment finally denied Petitioner's criminal appeal from a jury verdict rendered in the Circuit (Trial) Court of Geneva County, Alabama.

OPINIONS BELOW

The August 28, 1987 opinion of the Alabama Supreme Court, whose judgment is herein sought to be reviewed, is not reported and was issued per curiam, but a copy of which is attached. The prior

opinions of the Alabama Court of Criminal Appeals are unreported and also issued per curiam, are attached.

JURISDICTION

The final judgment and opinion of the Supreme Court of Alabama was entered on August 28, 1987 and a copy of said per curiam Order is included in the appendix. This Petition for Certiorari was filed more that 60 days but within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall he be compelled in any criminal case to be a witness against himself* (emphasis supplied), nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article 1, Section 6 of the Constitution of Alabama, 1901 provides in part:

to testify in all cases, in his own behalf, if he elects so to do;.....*and he shall not be compelled to give evidence against himself* (emphasis supplied), nor be deprived of life, liberty, or property, except by due process of law;.....

STATEMENT OF THE CASE

This is an appeal from a judgment rendered by the Circuit Judge of Geneva County, Alabama, in this action which was tried with a jury, argued, briefed and submitted on a complaint filed against Jackie Dallie Arrant, a.k.a. Gene Arrant. A warrant for the arrest of Jackie Dallie Arrant was issued on September 28, 1984. Petitioner Arrant and his co-defendant Joseph Ruben Jones were charged with a violation of the Alabama Criminal Code, namely, burglary-First Degree and theft of property-First Degree. Petitioner Arrant filed a Motion for Severance from co-defendant Jones, which was denied on September 16, 1985. The consolidated case(s) against Petitioner Jackie Dallie Arrant and Joseph Ruben Jones were tried on September 25, 1985, in the Geneva County Courthouse, Geneva, Alabama where Petitioner Arrant and Jones were found guilty by the jury of the allegations in the original indictment. A sentencing hearing was held on September 27, 1985 where Petitioner Arrant and Joseph Ruben Jones received the following sentences:

"Jackie Dallie Arrant — sentenced to six (6) years in the State Penitentary on Count I and to ten (10) years and one (1) day in the State Penitentary on Count II as punishment for his crime. These sentences shall run concurrently with each other.

> Defendant is ordered to pay $1,800.00 restitution plus court costs." Joseph Ruben Jones — the Court sentences the defendant under the Habitual Offender Act to fifteen (15) years in the State Penitentary on Count II, and to ninety-nine years in the State Penitentary on Count I as punishment for his crime. These sentences shall run concurrently with each other. Defendant is ordered to pay $1,800.00 restitution plus court costs including attorney's fees."

Co-defendant Joseph Ruben Jones filed a Motion for New Trial on September 27, 1985. Petitioner Jackie Dallie Arrant filed a Motion for a New Trial on October 1, 1985. The Motion for a New Trial for Jackie Dallie Arrant was denied November 1, 1985 (on the same date Joseph Ruben Jones' Motion for a New Trial was denied also). On January 28, 1986, a Motion to Correct the Record was filed jointly by both Petitioner Arrant and co-defendant Jones. Said Motion was orally heard on January 31, 1986 and the trial court denied said Motion on the 31st day of January 1986. From said denial Petitioner Arrant has appealed his cause from the Alabama Court of Appeals through the Alabama Supreme Court. The notice of appeal to Court of Criminal Appeals was initially filed on December 11, 1985 and the denial of the Petitioner's Writ of Certiorari to the Supreme Court of Alabama was final on August 28, 1987.

REASONS FOR GRANTING THE WRIT

DOES THE APPELLATE COURT'S DECISION INCORRECTLY CONSTRUE THE RIGHT OF SELF INCRIMINATION AS IS AFFORDED THE PETITIONER UNDER THE FIFTH AMENDMENT OF THE *CONSTITUTION OF THE UNITED STATES OF AMERICA* AND UNDER ARTICLE I, SECTION 6 OF THE *CONSTITUTION OF ALABAMA, 1901?*

The legal protection and guarantees afforded by the section(s) of the Constitution of Alabama and under the federal constitution Article 5, wherein the law provides that a person shall not be compelled in any criminal case to be a witness against himself is what the Petitioner Arrant is seeking in this case from this Court. Petitioner Arrant alleges that these inalienable rights during his trial were violated. Prior to trial, Petitioner Arrant was notified by co-defendant Jones' court appointed attorney that said attorney had instructed the Court that he did not expect his client to testify in his own behalf. Petitioner Arrant was fearful that any comments made by the State regarding any failure to testify by a defendant would be of a harmful nature and highly prejudicial, and that is why this issue was specifically addressed prior to the commencement of the trial. The record clearly reflects the precautions that were being taken by the defendants to insure that there would be no violation of either Defendant's constitutional right not to testify as provided by *U.S.C.A. Const. Amend. 5* and *Ala. Const. 1901 Art. I, Sec. 6.* Petitioner Arrant did not want to be unduly prejudiced by any reference by

by the State of Alabama to his co-defendant's failure to testify in his own behalf. It could be safely assumed that co-defendant Jones was merely attempting to exercise his lawful rights and Petitioner Arrant was trying to preserve said right of said co-defendant so that he would not be unduly prejudiced, especially in light of the fact that their cases were not severed.

Still after these precautions by defense counsel(s) the District Attorney in closing arguments made a comment regarding the co-defendant Jones' failure to testify. An objection was immediately made by both attorneys for defendants (Arrant and Jones) and a motion for the court to declare a mistrial based on this comment was requested. The record so reflects the objection, however, the specific comment by the District Attorney was left out of the record by the court recorder (in Alabama, closing argument is not taken down). The exception by Arrant as to the denial of his motion for mistrial is reflected in the record. This prosecutorial comment and its inappropriateness is clearly within the scope of *Griffin v. California*, 380 U.S. 609, (1965) which held that the state may not comment on a defendant's failure to testify in his own behalf.

The defendants' counsel argued in the Motion for New Trial that the comment was "you only heard the testimony of one Defendant." Again at the hearing regarding the Rule 10(f) motion under the *Alabama Rules of Appellate Procedure* to correct the record, the comment, alleged stated by the District Attorney, was "but we only heard from the one Defendant." However, the recollection that was offered by the State was not that a comment was not made, but

rather "that only one witness took the stand for the defense" (only Petitioner Arrant testified for the defense). That a comment was made is not in dispute. This is very close to the statement that was made in *Beecher vs. State,* 294 Ala. 674, 320 So.2d 727 (1975). That Court held that the comment ("...no one took the stand to deny it") was a direct comment on the Defendant's failure to testify. Clearly when there are two Defendants and only one testifies, a comment of this nature was highly improper and a virtual identification of the defendant. Certainly, it was in such a manner that the jury understood it as a comment on the Defendant Jones' failure to testify. *Ex parte Tucker,* 454 So.2d 552 (Ala. 1984).

Without the actual substance of the statement, Petitioner cannot attempt to argue that the comment was so prejudicial that it was in eradicable. *Warren vs. State,* 292 Ala. 71, 288 So.2d 826 (1973). However, whatever the comment may have been, the Court by its own admission acknowledged that one had been made and that it (the comment) was objectionable and improper. This is noted when the Court stated "I had rather it (the comment) not be mentioned again". Thus, Petitioner Arrant feels that the Court after the inappropriate prosecutional comment failed to give appropriate, prompt and vigorous instructions to cure this error. *Blackmon vs. State* 462 So.2d 1057 (Ala. Cr. App. 1985). The case of *Whitt vs. State,* 370 So.2d 736 (Ala. 1979), specifically set out the *minimum* (emphasis supplied) guidelines to be followed in order to cure this type of violation of prosecutorial duty. The *Whitt* Court and this Court in *Griffin* have suggested that, at a minimum, the Trial Judge must sustain the objection, and should then promptly and vigorously

give appropriate instructions to the jury. Such instructions to the jury by the trial judge should include that such remarks "are improper and to disregard them"; that "statements of Counsel are not evidence"; that "under the law the Defendant has the privilege to testify on his own behalf or not"; that "one cannot be compelled to testify against himself"; and, "that no presumption of guilt or inference of any kind should be drawn from his failure to testify" (emphasis supplied). *Whitt*, 370 So.2d at 739.

In the case at hand, when the comment was made the trial court response to the prosecutorial comment alleged herein, was not prompt, vigorous nor appropriate in its instructions to the jury when the Court stated that "I charge you at the present time that the Defendant does not have to take the stand and I had *rather it not be mentioned again* (emphasis supplied). I will further charge the Jury to that effect at the end of the arguments." The Court later in its oral charges stated that Joseph Ruben Jones did not testify, which he had a perfect right not to do. Also the Court stated that this fact was one that the jury could draw no inference from. Yet the Court denied the Defendants' Jury Charge Number 27 which was not only a proper statement of the law, but would more thoroughly have charged the Jury on the failure of a defendant not to testify in his own behalf.

The inappropriate manner that the court handled this entire matter is in direct conflict with the principals that are set out in *Smith vs. State* 370 So.2d 312, 317 (Ala. 1979) which sets out an accused Fifth Amendment rights and how a court must attempt to cure such comments Petitioner would assert, that the trial

court acted with too little force too late in the trial to insure that the Defendant's rights *were not infringed, U.S.C.A. Const. Amend. 5; Ala. Const. 1901,Art. I, Sec. 6, Code of Ala. 1975, Sec. 12-21-220.* In the *Blackmon* case that Court held that the instructions that were given were insufficient because they did not inform the Jury of the Defendant's right not to be compelled to testify and that no presumption could be drawn from the decision not to testify. The Court in *Blackmon* touched on these matters in oral charges, but stated that it did not cure the error because the charges were not prompt, nor given immediately after the prosecutor's remark. *Blackmon,* 462 So.2d at 1057; *Whitt,* 370 So.2d at 736.

In fact, Petitioner Arrant finds that the other Fifth Amendment guidelines as set out in *Whitt* were not followed. The record is silent or void as to the proper corrective instructions that the Trial Court should have given to the jury, namely that the comment was improper and that the jury should disregard it; that the statements of counsel were not evidence; that under the law the Defendant has the privilege to testify on his own behalf or not; that he cannot be compelled to testify against himself. Petitioner Arrant must conclude, therefore, that the comment of the State's Attorney was prejudicial and that the Trial Court's instructions fell far short of the necessary standard to cure the error, and for this error, Petitioner Arrant seeks reversal.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Alabama Supreme Court.

Respectfully submitted,

By: _____

J.E. Sawyer, Jr.
ROWE, ROWE & SAWYER
P.O. Box 150
Enterprise, Alabama 36331

Counsel for Petitioner

NOVEMBER 19, 1987

APPENDIX A

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
MONTGOMERY 36101

March 17, 1986

---

4 Div. 634 Geneva Circuit Court

JACKIE DALLIE ARRANT

Appellant

V.

STATE OF ALABAMA

Appellee

You are hereby notified that on March 17, 1986, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

XXXX Brief of Appellant filed.

MOLLIE JORDAN
CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
MONTGOMERY 36101

---

4 Div. 634

Geneva Circuit Court
CC 85-011, CC 85-036

JACKIE DALLIE ARRANT, ALIAS and
JOSEPH RUBEN JONES, ALIAS
Appellant

V.

STATE OF ALABAMA
Appellee

You are hereby notified that on May 12, 1987, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

X X X Affirmed on appeal. **No Opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

MOLLIE JORDAN
CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

APPENDIX C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
MONTGOMERY 36101

---

4 Div. 634 Geneva Circuit Court

JACKIE DALLIE ARRANT

Appellant

V.

STATE OF ALABAMA

Appellee

You are hereby notified that on May 26, 1987, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

X X X Application for rehearing filed.

MOLLIE JORDAN
CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

APPENDIX D

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
MONTGOMERY 36101

---

4 Div. 634

Geneva Circuit Court
CC 85-011, CC 85-036

JACKIE DALLIE ARRANT, ALIAS and
JOSEPH RUBEN JONES, ALIAS
Appellant

V.

STATE OF ALABAMA
Appellee

You are hereby notified that on June 9, 1987, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

X X X Applications for rehearing overruled. **No opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

MOLLIE JORDAN
CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

APPENDIX E

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
MONTGOMERY 36101

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4 Div. 634 Geneva Circuit Court

JACKIE DALLIE ARRANT

Appellant

V.

STATE OF ALABAMA

Appellee

You are hereby notified that on June 23, 1987, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

X X X Appellant's Motion for suspension of rule and request for additional facts denied by this Court today.

MOLLIE JORDAN
CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

APPENDIX F

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 28, 1987

86-1213
EX PARTE: Jackie Dallie Arrant
PETITION FOR WRIT OF CERTIORARI
(Re: Jackie Dallie Arrant, alias and Joseph Ruben Jones, alias V. State)
CCA 4/634

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

SHORES, J., TORBERT, CJ., JONES, ADAMS & STEAGALL, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record is said Court.
Witness my hand this 28 day of Aug. 1987.

Robert G. Esdale
Clerk, Supreme Court of Alabama